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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

The Respondent, Commissioner of Education of the State of New York does hereby move to dismiss the appeal herein.

The ground for the Respondent's motion to dismiss the appeal from the order of the New York Court of Appeals, decided October 22, 1959 and which order dismissed the appeal taken to such Court as of right, is as follows:

I. The appeal is not timely.

II. The appeal does not present a substantial Federal question.

The ground for Respondent's motion to dismiss the appeal from the order of the New York Court of Appeals,

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§ 311. **Powers of commissioner upon appeals or petitions, et cetera.** The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribed conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§ 2037. **Determination of meeting or election disputes.** All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election.

Statement of Facts

The source of the controversy in question was the adoption of a proposition, authorizing the construction of a school building at a cost not to exceed $1,350,000 and the issuance of obligations of the district in such sum, by the voters of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, at a special district meeting held on November 17, 1956. The proposition was carried by a vote of 597 in favor to 550 against. The total vote was 1147.

Reginald Lush, the Appellant herein, a qualified voter of the school district, appealed to the Respondent Commissioner of Education on behalf of the Red Jacket Citizens School Committee to set aside the election on numerous grounds.

The Petitioner alleged *inter alia* that 48 persons were not allowed to vote because they had not registered and 11 persons who had not registered were allowed to vote. The Commissioner of Education held that since registration was a prerequisite to voting, the 48 persons in question were properly refused the opportunity to vote. Moreover, it was also held that if the 11 voters who were allowed to vote, although unregistered, were counted as having voted for the proposition the result was not changed.

The Commissioner of Education also held, in accordance with previous decisions, that, for the purpose of determining a majority, void and blank votes are not counted.

The Commissioner of Education further decided that the remaining matters covered by the petition either involved matters not involved in the conduct of the school meeting or else would require the Commissioner to engage in sheer speculation.

The appeal was dismissed on March 27, 1957.

Thereafter, Reginald Lush commenced a proceeding under Article 78 of the New York Civil Practice Act seeking to review and annul Respondent Commissioner's decision.

Justice Herbert D. Hamm, presiding at a Special Term of the New York Supreme Court held in the County of Albany, on October 8, 1957 dismissed the petition on the merits. He stated that "the petition contains one hundred twenty-one allegations. There may be some 'fringe issues of fact' involved * * * but none of them is such that its resolution in the petitioner's favor would leave no rational basis for the Commissioner's decision."

Appellant then appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from Justice Hamm's order dismissing the petition in the Article 78 proceeding.

On June 20, 1958 the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County, moved for permission to intervene in the proceeding before the Appellate Division of the Supreme Court, Third Judicial Department, and such permission was granted by such Court August 4, 1958.

On December 5, 1958 the Respondent Board of Education voted to close portions of the Shortsville Elementary School. This action was taken on the recommendation of the District Superintendent of Schools because of letters from the local District Health Officer and the Fire Safety Co-ordinator of the New York State Education Department. As a result of the large number of pupils for whom provision had to be made because of the closing of a portion of this schoolhouse, double sessions became necessary.

Thereafter Roberta J. Abbott, a resident of the school district in question, with the attorney for Appellant herein representing her, commenced a proceeding under Article 78 of the New York Civil Practice Act to compel the Respondent Board of Education and the District Superintendent of Schools to reinstitute full-day school sessions.

On May 12, 1959 New York Supreme Court Justice Charles Lambiase dismissed the petition in the Abbott proceeding. In his decision Justice Lambiase said "It would seem that the two letters to which reference has heretofore been made constitute a sufficient basis for the exercise of discretion resulting in the curtailment of classroom hours, and that in the exercise of discretion there was sufficient evidence upon which the Board reached its conclusion that some of the classrooms in the building (taken out of use) were not safe." No appeal has been taken in the Abbott proceeding.

The Appellate Division of the Supreme Court, Third Judicial Department, in a decision dated April 23, 1959, unanimously affirmed the order of the lower Court dismissing the petition in the instant proceeding. On April 29, 1959 the Appellate Division of the Supreme Court, Third Judicial Department, amended its decision to allow costs. An order to this effect was entered on May 5, 1959 and Appellant thereupon appealed as of right to the New York Court of Appeals from such order.

The New York Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" on October 22, 1959, and an order to this effect was entered on November 5, 1959.

On December 3, 1959 Appellant moved in the Appellate Division of the Supreme Court, Third Judicial Department,

for reargument or for leave to appeal to the New York Court of Appeals. These motions were denied on January 12, 1960, and the order was entered on February 3, 1960.

On February 27, 1960 Appellant moved in the New York Court of Appeals for leave to appeal to the New York Court of Appeals. This motion was denied by the New York Court of Appeals on April 1, 1960, and the order was entered in the office of the Clerk of Albany County on April 21, 1960.

On or about June 27, 1960 the Appellant served on the Respondent Commissioner of Education and filed with the Clerk of the Court possessed of the record a Notice of Appeal to the United States Supreme Court from the aforesaid order of the New York Court of Appeals dated October 22, 1959, entered in the office of the Clerk of the County of Albany on November 5, 1959, and from the aforesaid order of the New York Court of Appeals, entered in the office of the Clerk of the County of Albany on April 21, 1960.

A cross-designation of additional portions of the record was served and filed by the Respondent Commissioner on or about July 15, 1960.

A further cross-designation of additional portions of the record was served and filed by Intervenor-Respondent on or about July 13, 1960.

On August 15, 1960 Honorable Charles S. Desmond, Chief Judge of the New York Court of Appeals granted Appellant's first motion to extend the time for filing the record in the United States Supreme Court to October 1, 1960.

On or about September 19, 1960 Appellant petitioned Respondent Commissioner of Education to reopen the appeal dismissed on March 27, 1957.

Around September 19, 1960 several persons presented a petition to the Board of Education to call a new meeting to vote in regard to erection of the school building in question. The Board of Education refused to act.

On October 7, 1960 Appellant requested the District Superintendent of Schools to order a new meeting. The District Superintendent declined upon the ground that he had no jurisdiction.

On November 17, 1960 Honorable Marvin R. Dye, Associate Judge of the New York Court of Appeals, granted Appellant's second motion to extend the time for filing the record in the United States Supreme Court to February 1, 1960.

On or about December 31, 1960 Reginald Lush and John Abbott commenced an Article 78 proceeding seeking to compel the Respondent Board of Education and the District Superintendent of Schools to call a special district meeting to reconsider the "disputed" proposition. The attorney of record for the Appellants in that proceeding is Francis G. Hessney, Esq. That proceeding remains *sub judice.*

On September 19, 1960 the Appellant herein filed an application with the Commissioner of Education seeking to have the Commissioner of Education reopen the appeal which resulted in the original determination of the Commissioner on March 27, 1957, which decision is the subject of this proceeding. On January 6, 1961 the Commissioner of Education dismissed this application to reopen on the grounds that the Appellant in such application had presented no new evidence and that the original decision had not been rendered under any misapprehension as to the law or the facts. The attorney for the Appellant herein

has stated that this dismissal of the application to reopen will be subjected to a court review in New York State, but as of this date such a proceeding has not been commenced.

ARGUMENT

I.

The appeal from the order of the New York Court of Appeals of October 22, 1959 is not timely.

The appeal from such order of the New York Court of Appeals on October 22, 1959 was not commenced within the time prescribed by statute. The Appellant has 90 days from the date of the final order and judgment of the highest court of the State of New York in which to commence an appeal to the United States Supreme Court under 28 U. S. C. 2101 (c). One of the orders sought to be appealed from herein was made by the New York Court of Appeals on October 22, 1959. Thus, the time for Appellant to appeal to this Court commenced on October 22, 1959 and had long since expired when the notice of appeal herein was served on or about June 27, 1960. In fact, it was approximately 235 days after the day of the order sought to be appealed from.

The Appellant herein after the order of the New York Court of Appeals denying the appeal as of right for lack of substantial constitutional question made a motion in the Appellate Division of the Supreme Court, Third Judicial Department, for reargument or for leave to appeal to the New York Court of Appeals. These motions were denied by the Appellate Division of the Supreme Court, Third Judicial Department, on January 12, 1960. Thereafter the Appellant made a motion in the New York Court of Ap-

peals for leave to appeal to the New York Court of Appeals, which motion was denied by the New York Court of Appeals by an order on April 1, 1960. The Appellant contends that these motions for reargument and leave to appeal tolled the 90-day period.

The time to appeal to the United States Supreme Court commences to run in the case of an appeal from the final order of the New York Court of Appeals on the date of the final order and judgment of the New York Court of Appeals which is sought to be appealed from. (*Department of Banking v. Pink*, 317 U. S. 264.)

The Appellant has never made a motion for reargument in the New York Court of Appeals from the order of the Court of Appeals dismissing his appeal to the New York Court of Appeals as of right, which order determined the lack of a substantial constitutional question, so there is no question as to the statutory period for bringing an appeal being tolled by a motion for reargument.

Motions for leave to appeal cannot be treated as applications for reargument since, in the first place, they are not such.

The Appellant herein obtained a final order of the New York Court of Appeals on October 22, 1959, which order determined that the New York Court of Appeals dismissed his appeal to such Court as of right upon the grounds that no substantial constitutional question was directly involved. There must be an end to litigation, and there must be definite time limits upon which litigants may depend. If a person wishes to appeal the final order of the New York Court of Appeals to this Court, such person should pursue his remedy expeditiously and file a notice of appeal within 90 days of the final order. The motions by the Appellant

for leave to appeal to the Court of Appeals were based upon Section 589 of the New York Civil Practice Act. The prior appeal as of right to the New York Court of Appeals by the Appellant had been based upon Section 588 of the New York Civil Practice Act, which provides for an appeal as of right in a proceeding directly involving the construction of the United States Constitution. The Appellant, as heretofore stated, took his appeal as of right based upon this said Section 588 of the New York Civil Practice Act and had the New York Court of Appeals determine by a final order that there was no substantial constitutional question directly involved. The Appellant thereafter did not file his notice of appeal to this Court within the 90-day period prescribed by statute, but instead abandoned his claim of a constitutional question and thus his right to appeal to the New York Court of Appeals as of right and then sought relief pursuant to Section 589 of the New York Civil Practice Act in motions addressed to both the Appellate Division of the Supreme Court, Third Judicial Department, and the New York Court of Appeals, requesting said Courts in their discretion to determine that an appeal should be granted to the New York Court of Appeals. The Appellant was unsuccessful in both of these motions. The Appellant herein thus could have brought his appeal to this Court within the 90 days after the final order of the New York Court of Appeals dismissing his appeal to such Court of Appeals as of right, but he failed to do so and since the notice of appeal is untimely motions for leave to appeal cannot revive the expired time to appeal.

II.

The appeal herein does not present a substantial Federal question.

At the outset, it is respectfully submitted that the purported appeal from the order of the New York Court of Appeals denying leave to appeal is not an appeal from a final order of the New York Court of Appeals within the meaning of U. S. 1257 (2) but is rather an order of the New York Court of Appeals denying a motion addressed to the discretion of such Court.

It is respectfully submitted that even if this appeal had been brought in a timely manner, the finding of any substantial Federal question is foreclosed by a multitude of prior decisions of Federal Courts, and particularly of this Court, which have already determined all issues purported to be raised herein by appellants.

Although Appellant purports to appeal to the United States Supreme Court under the provisions of subdivision (2) of Section 1257 of the United States Code, the Jurisdictional Statement and the Notice of Appeal are devoid of any allegation that any particular statute or statutes of the State of New York are "repugnant to the Constitution, treaties or laws of the United States."

There is a notable lack of evidence in the record that Appellant Reginald Lush was deprived of any "life, liberty, or property, without due process of law" or was denied "equal protection of the laws." (Article XIV, Section 1, of the Amendments to the Constitution of the United States.)

The appeal to the Commissioner of Education of the State of New York was taken pursuant to the provisions

of Section 310 of the New York State Education Law, and the decision of the Commissioner was rendered pursuant to that section and Section 2037 in the same manner as was upheld in *Murphy* v. *Commissioner of Education* (361 U. S. 117).

In the appeal to the Commissioner, the petitioners were afforded complete procedural due process of law and full protection of the laws of the State of New York. An examination of the record herein will demonstrate that the entire proceeding before the Commissioner of Education was conducted in compliance with rules adopted by the Commissioner pursuant to the express provisions of statute. All parties were given complete opportunity to file pleadings, to present whatever exhibits, documents, materials and affidavits they so desired, to argue the matter fully before the Commissioner and to file and exchange briefs. Only after all such material and briefs were submitted by the parties did the Commissioner of Education make his decision, based on the entire record before him. This is the same procedure which has been followed in literally thousands of appeals brought before the Commissioner of Education for decision in the past.

The Commissioners of Education of the State of New York over the years have decided fairly and impartially thousands of appeals relating to school matters which were brought pursuant to the provisions of Section 310 of the Education Law of the State of New York and the Rules of Practice drawn up by the Commissioner pursuant to Section 311 of the Education Law of the State of New York. There is nothing in this procedure which is repugnant to the Constitution of the United States. On the contrary, the Constitutional safeguards on behalf of the individual are specifically preserved in the aforesaid

statutes and rules. This same procedure was upheld in *Murphy v. Commissioner of Education*, 361 U. S. 117. (See also Kabatt v. Board of Education, certiorari denied 300 U. S. 657, rehearing denied 300 U. S. 687.)

Insofar as Section 2037 of the New York State Education Law is concerned, there appears to be no basis for questioning the constitutionality of the Legislature's action in prescribing that the Commissioner of Education, as head of the State's public educational system, shall settle in finality all disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election. The Commissioner is probably the best-qualified person in the State to decide such disputes, which undoubtedly is the reason the Legislature has placed this responsibility on him.

The Appellant Reginald Lush apparently was displeased with the outcome of the vote on the above-mentioned school construction project, but he has had his fair and just chance to present his viewpoints and to have his claims of irregularity decided legally by competent authority. His further displeasure with the result of his appeal does not make the procedure on appeal to the Commissioner of Education unconstitutional.

There appears to be no basis for Appellant's claim that the Commissioner's decision and order were unconstitutional.

Appellant has been treated fairly, equitable and impartially in this entire matter. He has not been deprived of or denied any of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

Respectfully submitted.

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JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
of Counsel.

decided April 1, 1960, denying a motion for leave to appeal to the New York Court of Appeals is as follows:

I. The appeal does not present a substantial Federal question.

The following sections of the Education Law of the State of New York are pertinent to this action:

§ 310. **Appeals or petitions to commissioner of education and other proceedings.** Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.